IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

STEPHEN YOUNG, ANTIMO DIMATTEO,
BENJAMIN VALENZUELA,
*Petitioners,*

v.

STATE OF NEW HAMPSHIRE,
*Respondent*

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**On Petition For a Writ of Certiorari to the Supreme Court of the State of New Hampshire**

## BRIEF FOR THE STATE OF NEW HAMPSHIRE IN OPPOSITION

THE STATE OF NEW HAMPSHIRE

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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a showing of probable cause for the installation and use of a pen register.

2. Whether a magistrate remains neutral and detached for purposes of issuing warrants under the Fourth Amendment, if he speaks with an investigating officer hours before issuing the warrants.

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## OPINION BELOW

The opinion of the New Hampshire Supreme Court (Petition Appendix (Pet. App.), 1a-34a) is not yet officially reported. The decision is unofficially reported in *State of New Hampshire v. Valenzuela, et al.*, No. 86-073 (N.H. Dec. 31, 1987).

## JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 31, 1987. The petition for a writ of certiorari was filed on February 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254; however, Petitioners failed to raise question 1 in the courts below.

## STATEMENT

The facts of the case are summarized in the opinion of the New Hampshire Supreme Court. (Pet. App., 1a-4a). Briefly, petitioners were found guilty of various violations of the New Hampshire Controlled Drug Act (N.H. RSA 318-B) following bench trials based upon stipulated evidence in the Rockingham County Superior Court. Petitioner Young was sentenced to a total of 25 to 70 years in prison. Petitioners Valenzuela and DiMatteo received prison sentences of 15 to 40 years.

1. New Hampshire State Police, working with agents of the federal Drug Enforcement Administration obtained authorization from the United States District Court for the District of New Hampshire to install pen registers on two telephone lines held by Petitioner Young. (Pet. App., 3a). Prior to trial, Petitioners moved to suppress the results of the pen registers on the ground that their installation and use without a finding of probable cause violated Part I, Article 19 of the New Hampshire Constitution. No reference was made in proceedings before either the trial court or the state Supreme Court, to any purported violation of federal law. (Pet. App., 4a, 39a). The trial court found no state constitutional violation and denied the motion. (Pet. App., 38a-42a).

2. Following completion of subsequent court authorized interceptions of communications over Petitioner Young's telephones, police arrested Alvin Kanigher and Robert Hollingworth[1] and prepared search warrants for the residences of the petitioners. Police determined that

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[1] The cases against Kanigher and Hollingworth were disposed of in proceedings separate from those against petitioners. Kanigher and Hollingworth are not parties to the petition.

Kanigher and Hollingworth would not be permitted telephone calls out of fear that they would notify petitioners of their arrest and of the impending searches.[2] About eight hours before asking the magistrate to issue the warrants, a State Police lieutenant called the magistrate to ask what might be the effect of barring an arrestee from making a telephone call. The magistrate replied that police might lose evidence obtained from the arrestee after the failure to allow a call. (Pet. App., 24a-25a). Petitioners moved to suppress the search warrants subsequently issued by the magistrate on the ground that having spoken with the police lieutenant, he was no longer neutral and detached. The trial court denied the motion. (Pet. App., 35a-37a).

3. On appeal, petitioners challenged, *inter alia*, the trial court's rulings that (a) the New Hampshire Constitution did not require a showing of probable cause as a prerequisite to authorization and use of a pen register and (b) there was no evidence to establish that the magistrate was not impartial in evaluating the bases for issuance of the search warrants. The New Hampshire Supreme Court rejected both claims. (Pet. App., 4a-17a, 24a-25a).

## ARGUMENT

1. Petitioners failed to raise a federal question about the installation and use of pen registers in proceedings before the courts below. The trial court specifically noted that "[t]his issue is raised in [petitioners'] motion solely as

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[2] Petitioner's assertion that Kanigher and Hollingworth were denied telephone calls in order to "obtain information" from them (Pet. 5) is unsupported by the record.

a N.H. State Constitutional issue" and that "the U.S. Constitution is not at issue." (Pet. App., 41a). The petitioners again presented only a state constitutional challenge to the use of the pen registers when the case reached the New Hampshire Supreme Court. (*See* Pet. App., 4a). The petition should be denied because the federal question has been raised for the first time in this case with the filing of the petition itself. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551, n. 5 (1980).

If the question has been preserved for consideration, the petition should be denied because the argument advanced by petitioners has been rejected by prior decision of this Court and by recent federal legislation. Petitioners argue that *Smith v. Maryland*, 442 U.S. 735 (1979) (which held that the use of a pen register did not constitute a search within the meaning of the fourth amendment) was wrongly decided.[3] It has become not only a fact of federal constitutional law, but also of national legislative policy that the use of a pen register does not constitute a search protected by the fourth amendment. The United States Congress only recently enacted legislation that permits a court to issue an *ex parte* order for the installation and use of a pen register upon certification by the government that "the information likely to be obtained from such installation and use is relevant to an

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[3] In the presentation of the question and briefly in their argument, petitioners imply that the device used in the present case is different from that discussed in *Smith* because, in addition to producing the information detected by a pen register, it had the potential of being used to intercept communications by the addition of supplementary equipment. Both the trial court and state Supreme Court expressly found no evidence that the device was used in this manner. (Pet. App., 2a, 40a).

ongoing criminal investigation." 18 U.S.C.A. §3123(a) (1987 supp.).

Given the established precedent of *Smith v. Maryland* and in view of the national legislature's rejection of the policy arguments advanced by petitioners, the petition fails to present a question that warrants further review.

2. Petitioners argued in the courts below that the magistrate who issued search warrants for their residences was neither neutral nor detached because of a brief conversation he held with a police lieutenant approximately eight hours before reviewing the warrant applications. The evidence presented on the motion showed that the lieutenant asked what the effect might be of holding an arrestee without permitting a phone call. The magistrate replied that evidence subsequently obtained from the person under arrest might be suppressed. (Pet. App., 24a-25a).

The trial court made specific findings of fact following a hearing on the motion. They were that (a) the magistrate's discussion with the officer played no role in the preparation of the search warrant affidavits (Pet. App., 36a); (b) the warrant applications were neither made nor presented to the magistrate by the officer who had earlier spoken to the magistrate (*id.*, 35a); (c) there was no evidence the magistrate knew the warrants were connected to the matter he had discussed with the police lieutenant (*id.*, 36a); and (d) the magistrate was not affiliated with the prosecution and was not improperly influenced (*id.*, 37a). The New Hampshire Supreme Court accepted these findings (*id.*, 25a) in affirming the trial court's ruling. The petitioners have since focused their argument not on whether the magistrate was neutral and detached, but on whether a warrant should be nulli-

fied where "there is an appearance or possibility" that the magistrate would be prejudiced (Pet., 15a), notwithstanding that the magistrate was neutral and detached in fact.

The Fourth Amendment requires "inferences of probable cause" to "be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972), quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948). Individuals who have taken charge of the investigation are thus disqualified from issuing warrants, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979), as are officials with a "'direct, personal, substantial, pecuniary interest'" in the decision to issue or deny the warrant. *Connolly v. Georgia*, 429 U.S. 245, 250 (1977). Petitioners do not allege that this case falls within those descriptions and do not suggest that the result reached by the court below conflicts with decisions of other courts.

Cases cited by petitioners in support of their argument are inapposite. The magistrate in the present case was a district court judge (Pet. App,. 35a) not affiliated with the police. Nor, as the trial court found, is there any suggestion that the magistrate's conversation with the police lieutenant was anything more than an abstract discussion of the possible effects of actions taken with regard to an arrested person. Petitioners point to no evidence that the conversation was connected in any respect to the magistrate's decision to issue the warrants. The absence of any tie between the conversation and the signing of the warrants makes the "appearance of prejudice" even more remote than in cases where the possibility of preju-

dice arguably bore directly upon the magistrate's determination of probable cause. *See* 2 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, [4.2(b), p. 156 (2nd ed. 1987) (calling "rightly rejected" arguments that magistrate who was "previously acquainted with the defendant and was aware of his criminal ways" was not neutral and detached); *Albitez v. Beto*, 465 F.2d 954, 956 (5th Cir. 1972) (magistrate's assistance in preparing affidavit did not detract from neutrality); *United States v. Steed*, 465 F.2d 1310 (9th Cir.), cert. denied, 409 U.S. 1078 (1972) (error harmless where magistrate prepared and typed affidavit from information provided verbally); *United States v. Duncan*, 420 F.2d 328, 331 (5th Cir. 1970) (accompanying police on raid did not detract from neutrality and detachment of magistrate).

The issue presented for review is too fact specific and dependent upon findings of fact by the trial court. In view of those findings and because the issue is unlikely to arise again, review on certiorari is inappropriate.

## CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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